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CURRENT TOPICS

Compensation Coal Stock

THE failure to commence on 1st March the making of interim payments of compensation coal stock to expropriated coalowners, as originally contemplated, was the subject of critical comment in *The Times* "City Notes" of 2nd March. The criticism, which takes into account the fact that it was not possible to lay the necessary regulations before the last Parliament, and that new regulations will be subject to prayers for annulment for forty days, is that no official statement has been made clarifying the position, and that the time-table for the payments due in September will have to be more carefully prepared. Only those who can show evidence of actual need for funds for business purposes are likely to have their claims met in the first batch, and industry's need of capital is a strong reason for urgency. *The Times* writer anticipates that it may be May or even June before the first batch of payments is made, because each application will have to be separately and fully examined, and ancillary questions to be dealt with include notification of and settlement with those who have any charges, liens, etc., on the assets for which compensation is paid.

His Majesty's Judges

CROOM-JOHNSON and MORRIS, JJ., must have been amused at some of the quotations appearing on the toast list of the Nottingham Law Students' Society's annual dinner, which they attended as guests on 28th February. The toast to "The Bench and the Bar," proposed by Mr. R. S. WHITBY, Vice-President of the Society, to which CROOM-JOHNSON, J., and Mr. W. A. SIME, M.B.E., replied, was headed "The cold neutrality of an impartial judge" (M. Brissot). The toast to "The Nottingham Law Students' Society," proposed by MORRIS, J., and answered by Mr. H. REEVE ALLERTON (the President of the Nottingham Incorporated Law Society), and by Mr. P. G. BALL (Joint Honorary Secretary of the Students' Society), was headed "It's aye the cheapest lawyer's fee to taste the barrel." Although the latter quotation seems intended as a gibe, the former is a tribute to the impartiality of the bench. Mr. R. S. Whitby, in his speech at the dinner, said that the King's judges represented what is best in our legal system, and the growth of ministerial tribunals, before which counsel and solicitors had no right to appear, should be checked. There can be no dissent from this proposition among those who have given the matter any thought.

"Hereinbefore Mentioned"

AN attempt having been made in this country to cleanse official documents of disfiguring jargon, something may now be done by the individual lawyer to shed superfluous verbiage in drafting. Sir ERNEST GOWERS' booklet was written for civil servants, but will be found useful to lawyers also. It is as difficult to abandon the habit of using such expressions as "hereinbefore mentioned" "and/or" and "as aforesaid" as it is to explain to the layman why they and/or similar expressions may sometimes be unavoidable in order to prevent

CONTENTS

ambiguity. For example, there can be no objection to the use of the word "said," if it serves to link up two places in a document where a name or an address is given. Nor can the use of the expression "and/or" be objectionable where it simultaneously links a number of things and presents them as alternatives. It is the inaccurate and excessive use of such expressions which is objectionable. Lawyers, however, are becoming increasingly word conscious. In the *Law Institute Journal* of 2nd January, 1950, Mr. PAUL C. NUNAN, writing on the abuse of the word "such," says that solicitors admitted in Victoria in recent years have had the advantage of practical training in draftsmanship. Cannot some qualified person write a book about it for lawyers in this country? Or is draftsmanship, like the "virtue" discussed in Plato's Meno, neither to be taught nor acquired but "somehow comes naturally"?

War Damage Payments

THE War Damage (Business and Private Chattels Schemes) Account for 1948–49, published on 22nd February, shows that the total of payments during the year under the business scheme was £6,130,757, compared with £5,129,231 in the previous year, and under the private chattels scheme £2,134,188. The aggregate of £8,264,945 contrasts with £54,475,575 in 1947–48. Interest of £196,043 was paid. £7,800,000 was received from the Consolidated Fund and recoveries in respect of claims were £7,837, salvage £263, and balance in hand at 1st April, 1948, £671,854, making a total of £8,479,954. The accompanying report states that the outstanding liabilities under the private chattels scheme are now relatively small. The date for general payment of business scheme claims has not yet been determined, but advances on grounds of public interest or undue hardship are made.

Recent Decisions

The Court of Appeal (BUCKNILL and SOMERVELL, L.JJ., and VAISEY, J.) held, on 28th February (*The Times*, 1st March), that where a respondent wife pleaded, in answer to a petitioner husband's charge of adultery, that she had been raped, the burden was first on the husband to prove sexual intercourse and then, when that was proved, on the wife to show that intercourse had not been voluntary.

In *Pearson* v. *Lambeth Borough Council*, on 1st March (*The Times*, 2nd March), the Court of Appeal (COHEN and ASQUITH, L.JJ., and ROXBURGH, J.) held that when a person leaving a public convenience bumped his head on an overhead grille which, though normally drawn back, had been pulled forward by children, who had been in the habit of tampering with it and had been swinging on it that morning, there was a danger of which the defendants knew and therefore as occupiers of the premises they were liable to licensees, and therefore to the injured person. The court held that even if the matter were without authority they would have been inclined to hold that the plaintiff was an invitee.

In *Middleton* v. *Baldock*, on 2nd March (*The Times*, 3rd March), the Court of Appeal (the MASTER OF THE ROLLS and DENNING and JENKINS, L.JJ.) held that where a husband deserted his wife, leaving her in occupation of a house of which he was the tenant, she was rightly in occupation on her husband's behalf; the husband's offer to the landlord to give up possession and even his submission to an order for possession against him were quite ineffective and the only way in which he could give up possession to his landlord was by getting the court to order his wife to go out of possession or by forcibly ejecting her. The court would not make such an order where a husband had deserted his wife and she had nowhere else to go.

Taxation

WHAT DISPOSITIONS OF PROPERTY ARE DUTIABLE AS GIFTS?

EVERYONE with the most superficial knowledge of estate duty law knows that duty is levied on gifts made within a certain period (now five years) before death. Lawyers know, in addition, that gifts made at any time are dutiable if a benefit was reserved. It is not generally realised, however, even by lawyers, that for many years the leading textbooks have asserted that every disposition of property is for this purpose a gift, and that if such a disposition in any given case is not dutiable, it escapes only by virtue of the express exemption in s. 3 of the Finance Act, 1894, of property passing for full consideration in money's worth. These assertions are founded on the *dicta* of a learned judge in an Irish case, and lead to the surprising conclusion that a conveyance on sale, for instance, is "an exempt gift." However, the recent judgment of Danckwerts, J., in *Re Fitzwilliam's Agreement* (1950), 94 SOL. J. 49, has shown that this method of approach rests on a fallacy, and that the Finance Act, 1894, was not intended to tax dispositions *inter vivos* unless they were (wholly or in part) gifts in the accepted sense of the word. The subject is an important one, as borderline cases constantly arise, and therefore it will be useful to examine the law at some length. The main enactment charging duty on gifts is still the Customs and Inland Revenue Act, 1881; to understand the present law it is still necessary to begin with that Act and trace the subsequent amendments.

At the date of the Act of 1881 probate duty was charged on personal property comprised in a grant of probate or administration, but not on any other property. Therefore, by s. 38 of the Act, a new duty, called account duty, was levied on various items of property which the deceased had parted with in anticipation of death; and first and foremost it was levied on gifts *inter vivos* in the following words (s. 38 (2) (*a*)):—

> "Any property taken under a voluntary disposition . . . purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made three months before the death of the deceased."

In this subsection two phrases leap to the eye:—

> "Voluntary disposition."
>
> "Purporting to operate as an immediate gift."

Evidently a "voluntary disposition" bears its ordinary common law meaning, i.e., a disposition for which no consideration of any kind is received. "Immediate gift" implies that the transaction is carried out as a matter of bounty, to confer a free benefit; so long as the word "voluntary" was in the section, the word "gift" did not really add much to its meaning.

The Customs and Inland Revenue Act, 1889, s. 11, extended this charge in two respects. First, the three-month period before death was altered to twelve months (subsequently

it became three years, and finally, under the Finance Act, 1946, five). Secondly, s. 11 brought in gifts with a reservation, at whatever date they were made; in this connection the term "voluntary dispositions" is not used, there is simply a reference to "property taken under a gift," but the divergence in the wording seems to be unimportant, though it was referred to in *Fitzwilliam's* case.

As is well known, the Finance Act, 1894, abolished both probate and account duty, and substituted estate duty based on a more sweeping principle. In its wider aspects it extended to real property and settled property, as well as to free personalty; and under s. 1 of the Act the test of liability was not whether the property was comprised in a grant of probate or administration, but whether it "passed on death." Like the Act of 1881, the new scheme had to meet the cases (evasive or otherwise) where property was relinquished in anticipation of death; to bring these cases within the new principle, various classes of property were, by virtue of s. 2 of the Act, "deemed" to pass on death. In particular s. 2 took over bodily all the old account duty cases from the Acts of 1881 and 1889, which were incorporated by reference, but with these two important amendments—

(*a*) the charge was extended to "real" as well as "personal" property;

(*b*) the word "voluntary" was deleted—so that "voluntary disposition," in the Act of 1881, became "disposition" *simpliciter*.

To complete this outline of the scheme of 1894, reference must be made to s. 3 of the Act, under which property passing by reason only of purchase for *full* money consideration is exempt from duty, while a deduction is allowed where purchase takes place for a *partial* money consideration. This section applies in terms to property which "passes," but must also include property which is "deemed" to pass under s. 2; it is important to note that it does not apply specifically to gifts, but to all dutiable property, and on the face of the section it operates as an exemption, that is to say, it cannot apply to property which has not been brought into charge by ss. 1 and 2, read with the incorporated sections of the Acts of 1881 and 1889. These points have to be emphasised because, in relation to gifts, as will be seen, s. 3 has been given greater weight than it deserves.

The serious question raised by the Act of 1894 was the effect on the taxation of gifts *inter vivos* of omitting the word "voluntary." Under the Act of 1881, as amended by s. 2 (1) (*c*) of the Act of 1894, property is chargeable under any "disposition," as distinct from any "voluntary disposition"; but the disposition must still "operate as an immediate gift." Unfortunately the issue was complicated by the fact that most of the cases which came before the courts in the early days were marriage settlements. It became established that a settlement made by a party to the marriage, in consideration of the marriage, did not constitute a dutiable gift. On the other hand, a settlement made by a third party (such as a father) in consideration of marriage, though not "voluntary" under the Act of 1881, was held to be chargeable under the Act of 1894. This was the decision in the Irish case of *A.-G.* v. *Smyth* [1905] 2 Ir.R. 553, approved by the Scottish courts in *H.M. Advocate* v. *Heywood-Lonsdale's Trustees* (1906), 43 S.L.R. 529. Fortunately, these fine distinctions in marriage cases have lost their importance, as s. 59 of the Finance (1909–10) Act, 1910, granted exemption from duty for all gifts in consideration of marriage.

Unfortunately, Palles, C.B., an Irish judge whose authority in revenue matters stands very high, seized the opportunity in *A.-G.* v. *Smyth* to elaborate a theory on the construction of the Acts of 1881 and 1894 which was by no means necessary for the decision of the case. According to this theory the deletion of the word "voluntary" by s. 2 (1) (*c*) of the Act of 1894 must be read in close conjunction with s. 3 of the Act—almost as if the latter section were a proviso to s. 2 (1) (*c*), instead of to ss. 1 and 2 as a whole. From this premise the conclusion was easily reached that every disposition *inter vivos* was dutiable, unless money consideration could be proved under s. 3. Naturally, this would throw the onus of proof on the disponee in a doubtful case; it would also enable the court to inquire into the adequacy of the consideration given (for under s. 3 partial consideration does not justify exemption, but only a deduction *pro tanto*). On these *dicta* are founded the statements in the leading textbooks that all dispositions within five years of death, or before that period if made with a reservation, are *prima facie* dutiable, and that a sale for full consideration is an "exempt gift." It is curious that these statements and *dicta* have gone unchallenged for so long. At all events, when the question arose for decision in *Re Earl Fitzwilliam's Agreement* (1950), 94 SOL. J. 49, it was raised in a clear-cut form, and Danckwerts, J., held that the law had been misunderstood, and that the Act of 1881 (as adopted in 1894) applies only to transactions which are in some sense gifts in the ordinary sense of the word. It does not apply at all to transactions which are *bona fide* sales, and therefore it is not necessary for the purchaser in such cases to rely on s. 3 of the Act of 1894.

In the *Fitzwilliam* case, the Earl had purchased a substantial annuity more than three years before his death (this was the period in force at the time). The purchase was made from the trustees of his son's marriage settlement, to whom he transferred substantial investments, which were equal to the actuarial value of the annuity. The revenue claimed duty on the investments as being a "gift." The point of the case for the revenue was that, by virtue of s. 44 of the Finance Act, 1940, an annuity purchased from a relative does not qualify as consideration under s. 3 of the Act of 1894. If, therefore, every disposition is *prima facie* dutiable, but a way of escape is provided under s. 3 and not otherwise, the claim for duty was a sound one, as the way of escape in this case was closed by the Act of 1940. Danckwerts, J., in a reserved judgment, held that a sale for full value is outside the scope of the Act of 1881, and there is no need to rely on s. 3; accordingly, duty was not chargeable.

The decision does not, of course, answer every question in which a practical lawyer is interested; it relates in terms only to a case where full value is proved to have been given. What happens if the purchaser has obtained a good bargain, though the transaction was a *bona fide* sale? It is submitted that once it is shown that there was a *bona fide* sale, without any element of "bounty," the court has no jurisdiction to inquire into the adequacy of the consideration; and this is supported to some extent by *Re Samuel Thornley* (1928), 7 A.T.C. 178 (sale of shares in private company at less than accountant's valuation).

Reduced to its simplest terms, the law seems to be this:—

(1) The Act of 1881 only taxed gifts—i.e., there had to be an element of bounty.

(2) So long as the word "voluntary" remained in the section, gifts were not taxable if some consideration was received.

(3) The deletion of this word brought in dispositions where it was intended to give something away, notwithstanding that a partial consideration was received in return.

J. H. M.

A Conveyancer's Diary

ULTIMATE TRUSTS AND THE PERPETUITY RULE

THE danger that an ultimate trust in a will or a settlement, designed to take effect on the failure of the primary trusts, may infringe the rule against perpetuities if the class of persons to take under that trust is defined as the statutory next of kin of the testator or settlor, is brought out in *Re Hart's Will Trusts* (1949), 93 SOL. J. 791. This was a case in which the damage was due not to a slip on the part of the draftsman, but to a statutory substitution of wording in the testator's will; but trusts of this kind are not easy to frame, and I have seen some recent settlements in which the effect of the clauses containing the ultimate dispositions would certainly have required construction by the court if they had become operative.

In *Re Hart's Will Trusts*, *supra*, the testator, by his will made in 1923, after setting up a trust fund and creating certain interests therein, by cl. 14 directed that his trustees should, subject to the prior trusts therein, appropriate the trust fund between such of his children as should survive him or die in his lifetime leaving issue him surviving in certain shares, and by cl. 15 he provided that the property appropriated to any child of his should be retained by his trustees upon protective trusts. Subject as aforesaid, the testator's children were given a power of appointment over their respective interests in the trust fund, and in default of such appointment the will contained the usual trust for all or any of the children or child of any of the testator's children who should be living at the testator's death or born afterwards and who should attain the age of twenty-one years. Stopping at this point, it will be observed that if the testator had had a child and that child had had children born after the death of the testator, the vesting of the testator's grandchildren's shares under the trust in default of appointment would have been postponed, in certain events, to the very last minute of the period permitted by the rule against perpetuities.

The ultimate trust was contained in cl. 16, whereby the testator provided that in the event of the failure or determination of the trusts thereinbefore contained, and subject to the trusts, etc., thereinbefore declared, the trustees should hold the trust fund for the persons who would at the time of the failure or determination of the prior trusts have been entitled to the testator's personal estate, under the statutes for the distribution of the personal estate of intestates, if the testator had died at the time of such failure or determination intestate. The testator having died in 1927, s. 50 of the Administration of Estates Act, 1925, became applicable to this clause. This section provides that references to any Statutes of Distribution in a will coming into operation after 1925 shall be construed as references to Pt. IV of that Act, and that references in such a will to statutory next of kin shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on an intestacy under the foregoing provisions of the Act.

Part IV of the Act (which is headed "Distribution of Residuary Estate") includes ss. 46 and 47. Section 46 prescribes the persons who will take the residuary estate of an intestate, these persons being the surviving spouse of the intestate, the issue, parents, brothers and sisters, etc. But unlike the interests conferred upon statutory next of kin by the old Statutes of Distribution, the interests of the statutory next of kin under Pt. IV of the Act of 1925 are not always vested interests. In the case of the intestate's issue, for example, s. 46 (1) (i) (*b*) provides that the residuary estate shall be held, subject as therein provided, on the statutory trusts for the issue of the intestate; and similar provisions are made by s. 46 (1) (v) in the case of the intestate's brothers and sisters and uncles and aunts. By s. 47 (1) it is provided that the statutory trusts for the issue of an intestate shall be a trust, in equal shares if more than one, for all or any the children or child of the intestate living at the death of the intestate who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take *per stirpes*, etc. By s. 47 (3) the statutory trusts in favour of relatives of the intestate other than issue (that is, brothers and sisters and uncles and aunts) are declared to be trusts corresponding, with an immaterial exception, to the similar trusts set out at length in the Act in favour of the intestate's issue. The result of these provisions is that if at the material time the class of persons to take under s. 46 of the Act, or under any trust framed by reference to that section, includes persons who are either issue or brothers and sisters or uncles and aunts, the application of the statutory trusts to these persons by s. 47 (1) turns the interest of any of such persons as are infants and unmarried at that time into contingent interests, since the interests of such persons will not become vested until the person in question attains the age of twenty-one years or alternatively marries under that age.

In *Re Hart's Will Trusts*, *supra*, the trusts declared by cl. 16 of the will, as modified by statute, were held to fail under the rule against perpetuities, because it was possible for a person ascertained in accordance with that clause, as modified, to have a contingent interest at the end of the longest period allowed for the vesting of interests by the perpetuity rule.

This result was directly due to the operation upon cl. 16 of the will of s. 50 of the Administration of Estates Act, 1925, and the lack of foresight on the part of the draftsman of that provision in respect of the consequences of a substitution of a class of persons having possibly contingent interests for a class whose interests (under the old Statutes of Distribution) were indisputably vested, and to this extent the facts of the case were peculiar and not likely to occur very often again. But the trap into which the draftsman of the Act fell still yawns for the draftsman of a private instrument, a will or (more particularly) a settlement, and this decision is a useful reminder of its presence. If it is desired to frame an ultimate trust in favour of statutory next of kin by reference to the Administration of Estates Act, 1925, the trust must be so drawn that the class of persons to take is ascertained either at the death of the testator or settlor or upon a notional date of death which is itself fixed as not later than the death of a life in being for the purpose of the perpetuity rule.

These alternatives may conveniently be examined in two precedents in Prideaux's Precedents in Conveyancing, 23rd ed., pp. 132 and 226; the former (which is framed for a marriage settlement) refers to an actual death, the latter (which is framed for a settlement *inter vivos* upon children) to a death on a notional date.

"A B C"

Landlord and Tenant Notebook

CONTROL AND NOSTALGIA

"ALWAYS wished to go back" was the statement which, according to the county court judge's notes, concluded the evidence given by the defendant in *Morleys (Birmingham), Ltd.* v. *Slater* (1950), 94 SOL. J. 146 (C.A.). Many years ago one Ulysses is said to have felt the fulfilment of the same desire being frustrated, like that of the aforementioned defendant, by circumstances arising out of a war. The victim of those circumstances was in the one case a king, in the other a rag and bone merchant; this difference is unimportant, but what might suggest the drawing of a distinction is that in the king's case the building was intact, in the other (to quote from the judgment of Evershed, M.R., in the Court of Appeal) "the premises were damaged by enemy action in November, 1940, and, as the result of that damage, now over nine years' old, they became and are still uninhabitable. That is, of course, a word of somewhat elastic import, but I think it should be understood here as meaning that they are not capable of being occupied and used in the ordinary sense of the term for living quarters . . . The tenant, however, is still in occupation of the premises, and the evidence is that he uses them now for his business . . . formerly he used the premises in part as his home and partly for his business."

The landlords had given a notice to quit which had expired on 1st July, 1949, and in their claim for possession placed reliance on the decision in *Ellis & Sons Amalgamated Properties, Ltd.* v. *Sisman* [1948] 1 K.B. 653. That case concerned a new house which had been built by the local council on the site of a similar building which had been demolished after enemy action had made it unsafe to live in. The enemy action had occurred in 1941 but, though the defendant then held it of the plaintiffs as a weekly tenant, neither gave any notice under the Landlord and Tenant (War Damage) Acts. But, before the new house had been completed, the plaintiffs served the defendant with a notice to quit. It was held that the Rent, etc., Restrictions Acts did not apply to a site and that when the notice expired the defendant was not tenant of a dwelling-house, i.e., a dwelling-house let as a separate dwelling (1920 Act, s. 12 (2)); consequently the notice to quit did not convert the contractual tenancy into a statutory one, however anxious the tenant was to return. A few months later, in *Simper* v. *Coombs* (1948), 92 SOL. J. 85, a tenant whose house had been destroyed by a flying bomb was able to recover possession of one which replaced it, the landlord not having determined the tenancy before the new building had been completed; in *Denman* v. *Brise* [1949] 1 K.B. 22 (C.A.), the result was the same though a notice to quit had been served—after the new house had been completed and was fit for occupation. In both these cases some emphasis was laid on the fact that the defendants had never manifested any intention to abandon the premises.

Now in the *Ellis & Sons* case Tucker, L.J., had said ". . . but the house must be one which is *being used* by the tenant as a dwelling-house. In the present case . . . the house was not completed or fit for habitation . . . and it was . . . not only not being used as a dwelling-house, but it was not fit for or capable of user as a dwelling-house at the material date." That, it was argued for the plaintiffs in *Morleys (Birmingham), Ltd.* v. *Slater*, covered the position in their case. Evershed, M.R., disagreed, explaining the passage in this way: the language either did not mean that there must be actual or even possible user of the house as a dwelling-house by the tenant, or, if it did, it was said *obiter*. Earlier parts of the same judgment show that it was the total disappearance of the subject-matter of the contract, plus the fact that the tenant could not, when the notice to quit expired, have said: "This house was occupied as my home by me," that indicated the *ratio decidendi*. Likewise, while Cohen, L.J., did, in the earlier case, refer to there having been no house fit for occupation at the material date, he also attached importance to the fact that the house comprised in the original tenancy had ceased to exist *as a house*. Habitability was not the true test; a house might be temporarily uninhabitable owing to some neighbouring river having burst its banks; this would not entitle the landlord to say that the house was not let to the tenant as a dwelling-house.

"This house was occupied as my home by me": the learned Master of the Rolls' expression reminds us that the object of all this legislation is, as Romer, L.J., put it in *Haskins* v. *Lewis* [1931] 2 K.B. 1 (C.A.), to protect a person residing in a dwelling-house from being turned out of his home. Talbot, J., cited the passage in question in *Skinner* v. *Geary* [1931] 2 K.B. 546 (C.A.), and in the same case Scrutton, L.J., distinguished the case of a tenant who went and lived elsewhere and never contemplated residing in the house again from that of a tenant, say a sea captain, who might be absent for months, who had the intention of returning to it *as his home*. This was applied in *Wigley* v. *Leigh* (1950), 94 SOL. J. 129 (C.A.). The defendant tenant was a married woman; her tenancy had already become a statutory one when, in 1940, her husband having enlisted in the army, she went and lived in Ireland with some friends. She sub-let the house furnished, and when her husband was demobilised in 1945 she gave the sub-tenant notice to quit. The plaintiff had taken no action while this sub-tenancy existed, and nothing had happened to the house. But the defendant then had a haemorrhage and her doctors would not allow her to return. The prohibition remained in force (except that she was permitted to spend the summer months of 1947 in the house) and at the time of the proceedings was expressed in an agreed statement in these terms: "Her medical advisers have further advised that she should not return to the premises permanently until her health further improves or living conditions in England sufficiently improve." The fact that no definite date could be named did not, the Court of Appeal held, negative an intention to return, which was also evidenced by the facts that money had been spent on and improvements made to the house by the defendant in 1947 and 1948, that her husband had occasionally spent week-ends in the house, and that a man was employed to reside on the premises and keep them ready for occupation. "There is no reason to suppose that she will not return within a reasonable time" is, I think, a vital part of the judgment delivered by Bucknill, L.J., which would imply that mere nostalgia is not enough. But Denning, L.J., did not emphasise the factor of prospects, taking rather the view that the house was the matrimonial home and that it was occupied by the tenant though she was not there physically.

Both lords justices, it may be added, mentioned that the house was the only home; but I think that these observations should be regarded as *obiter dicta* in view of *Langford Property Co., Ltd.* v. *Tureman* [1949] 2 K.B. 29 (C.A.) and *Green* v. *Coggins* (1949), 93 SOL. J. 741 (C.A.), which show that, while the fundamental purpose of the Acts is, as stated in *Haskins* v. *Lewis*, *supra*, to prevent a resident tenant from being turned out of "his" home, there are occasions when a right to two homes will be recognised or, at all events, a tenant will be protected against being turned out of a "home from home."

R. B.

Costs

INTEREST

THE time from which interest is allowed to run on costs differs according to the nature of the costs and the manner of claiming the interest, and we will now look briefly at the statutory provisions relating thereto.

In the first place we will consider non-contentious costs. Rule 7 of the General Order, 1882, made pursuant to the Solicitors Remuneration Act, 1881, provides that a solicitor may charge interest at the rate of 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client.

We are reminded here of the significance of the word "disbursements." It will be remembered that the Court of Appeal stated, in the case of *Sadd* v. *Griffin* [1908] 2 K.B. 510: "We hold, therefore, that for the purpose of taxation under the Solicitors Act 'disbursements' mean actual payments before the delivery of the bill, and that any sums claimed in the bill and not paid before its delivery must be disallowed." Further, we recollect that by R.S.C., Ord. 65, r. 27 (29*a*), where a solicitor has incurred expenses which have not been paid at the date of the delivery of the bill of costs he may claim such expenses, provided he sets them out separately in the bill and states that the amounts have not actually been paid.

The upshot of this is, therefore, that although r. 7 of the General Order, 1882, provides for interest on the solicitor's disbursements and costs, it must clearly mean payments that have actually been made before delivery of the bill, and the solicitor will not be entitled to claim interest on that portion of his bill represented by unpaid expenses, even where they are set out separately in accordance with Ord. 65, r. 27 (29*a*), *supra*.

The interest will run from one month after the demand, and we have the assurance of Lindley, L.J., in the case of *Blair* v. *Cordner* (1887), 19 Q.B.D. 516, that the word "demand" in r. 7 refers to the bill of costs and not to the interest itself, so that the rendering of a bill constitutes a demand for the amount thereof, and interest may be claimed from the expiration of one month after delivery of the bill.

This point is of importance where a bill is delivered which, after considerable delay and possibly many reminders, is not paid and the solicitor decides to take action for recovery of the amount of his bill of costs. He may then claim in the action not only the total amount of his bill of costs, but also a sum by way of interest thereon at the rate of 4 per cent. per annum from the expiration of one month after he first delivered the bill to his client.

Delivery of a lump sum bill under the Solicitors' Remuneration (Gross Sum) Order, 1934, would constitute a demand within the meaning of r. 7, although the client might subsequently demand details thereof, and a detailed bill would certainly have to be delivered before the solicitor could obtain judgment for the amount of his costs. Since, however, delivery of a lump sum bill is authorised by the 1934 Order, and would thus constitute a demand, the solicitor would be entitled to interest on his disbursements and costs included in the lump sum bill from the expiration of one month after the delivery thereof.

One more point with regard to disbursements should be noticed. The word "disbursements," apart from its relationship to expenses that have actually been paid, is further limited to those payments which are made in pursuance of the professional duties undertaken by the solicitor, and which he is bound to perform whether he is kept in funds or not, or payments which are sanctioned as professional payments by the established custom or practice of the profession (see *Sadd* v. *Griffin*, *supra*). Items such as estate duty, capital duty on the registration of a company, and payments to other parties' solicitors in respect of costs are examples of payments which are not within this definition, with the result that a solicitor cannot include these items in his bill of costs as disbursements even if he has paid them with his client's consent with the object of recovering interest thereon. They are advances made on the client's behalf and not costs items at all.

It will be noted that r. 7 is part of the General Order of 1882, and r. 2 of that order defines the limits within which such order operates. Thus, it applies only to sales, purchases and mortgages of property, leases and agreements for leases and all matters to which Sched. II to the order applies. Schedule II, we have noticed, applies to all professional business which is not actually litigious (see 93 SOL. J. 784, where the subject is discussed fully), with the result that it is only in respect of costs of non-contentious business to which the General Order of 1882 relates that the solicitor is entitled to interest under r. 7.

So far as contentious business is concerned we must turn to other regulations for authority to charge interest on a bill of costs. Thus, s. 63 (3) (i) of the Solicitors Act, 1932, gives the taxing officer authority on every taxation of costs with respect to any contentious business to allow interest at such rate and for such time as he thinks just on moneys disbursed by the solicitor for the client. Observe that this award of interest can relate only to the disbursements as distinct from the profit costs and it is entirely within the discretion of the taxing officer. Moreover, the solicitor who has received from the client money on account cannot appropriate that money to the profit costs portion of the bill so as to leave a balance of disbursements unpaid for the purpose of claiming interest on those disbursements (see *Re Harrison* (1886), 33 Ch. D. 52). Further, this provision relates only to costs as between a solicitor and his lay client and has no application to costs as between principal and agent (see the case of *Ward* v. *Eyre* (1880), 15 Ch. D. 130, a case decided on a similar provision contained in the Attorneys and Solicitors Act, 1870).

This latter case emphasised the fact that the ordinary relationship between solicitor and client does not subsist as between a principal and his agent, so that where the solicitor's bill of costs contains items, including disbursements, incurred by his professional agent and the solicitor is awarded and receives interest on the disbursements under s. 63 (3) (i), *supra*, he is not, in the absence of any special agreement between himself and his agent, bound to share that interest with the latter, although it may be that it is upon the agent's disbursements that the interest is earned (see *Ward* v. *Lawson* (1890), 43 Ch. D. 353).

There is something a little uncertain about this provision, for in order to get any interest at all under it the costs have got to be taxed. Even then there is no certainty about being awarded interest, for it is a matter entirely within the discretion of the taxing master, and even the rate is left to his judgment. Moreover, even then the interest is only allowable on the amount of the disbursements.

It was, however, a useful provision to bear in mind where the disbursements in a particular matter had been heavy

and the solicitor was unable to recover his costs without resort to action. He can now, of course, as can every other creditor, claim, in an action against his client for the amount of his costs, interest thereon from the date when the debt arose in accordance with s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934. Prior to the passing of the latter statute it was necessary to claim interest on the amount of the debt under s. 28 of the Civil Procedure Act, 1833, and notice then had to be served before the action for the recovery of the debt was instituted, and the interest only began to run from the date of the notice. The necessity for a notice no longer arises, however, under the 1934 Act, with the result that the provisions of s. 63 (3) (i), mentioned above, are no longer of much utility.

Apart from the provisions already mentioned a solicitor is entitled to interest on the amount of his costs recoverable from another party under a judgment in accordance with ss. 17 and 18 of the Judgments Act, 1838. Section 17 provides that every judgment shall carry interest at the rate of 4 per cent. per annum from the time of entering up the judgment, so that where a solicitor is awarded costs under a judgment he is entitled to interest from the date of the judgment although the costs may not be taxed and the amount determined until some time later. At one time it was held that the interest should run only from the date of the taxing master's certificate but this view was held to be incorrect in the case of *Schroeder* v. *Clough* (1887), 35 L.T. 850.

Section 18 then provides that all decrees and orders of courts of equity, and all rules of courts of common law and all orders of the Lord Chancellor in matters of lunacy shall have the effect of judgments. It follows from this that interest is not payable on costs awarded by an arbitrator, although such costs may be taxed in the High Court, nor is it payable on House of Lords costs or Privy Council costs, since the award of an arbitrator and judgments in the House of Lords and the Privy Council do not come within the provisions of ss. 17 and 18, *supra*.

In a case where the judgment of the lower court is reversed by the Court of Appeal but upheld by the House of Lords the successful party will be entitled to interest on the lower court costs from the date of the original judgment in that court (see *Ashworth* v. *English Card Clothing Co.* [1904] 1 Ch. D. 704) and on the costs of the Court of Appeal from the date of the order of the Court of Appeal.

J. L. R. R.

PRACTICAL CONVEYANCING—IX

Searches against Vendor's Predecessors in Title

Some of the comments in the second edition of Strong's Practical Guide to Searches, published recently, provide food for thought on the matter of the persons against whom searches should be made. It is stated, at p. 14, that "Having regard to s. 198 of the Law of Property Act [which provides that registration under the Land Charges Act, 1925, constitutes actual notice to all persons] it must be assumed that a purchaser has notice of all charges registered, so that it is not sufficient to make searches back to the date of the last purchase for value in accordance with the pre-1926 practice, they must extend to all persons who have been interested since the creation of the registers. It is consequently a convenient practice for the vendor to abstract all certificates of search, and to produce them when the deeds are examined. It is a practice which is more often honoured in the breach than in the observance, and if the certificates of search are not so abstracted and produced a requisition should be made for their production, which saves the purchaser's solicitor from making further searches against the names of the persons to whom they relate."

If particulars of a certificate of search are included in the abstract the result will usually be to show that there are no material entries in the registers or that any entries refer only to documents which are abstracted. It is clear that a vendor cannot be required to give information which serves to show merely the negative fact that the property is not encumbered and so it can be argued that he should not be required to abstract search certificates which merely show that there are no adverse entries in the registers. On the other hand it is not difficult to abstract the certificates and the balance of convenience seems to be on the side of doing this. The writer is not aware that it is the usual custom to abstract them in any part of the country although some solicitors do so. There is no decision on the point and it is not one likely to come before the court, although there is certainly no ground for alleging that a vendor should make additional searches so that the certificates shall be available to the purchaser. It is suggested that solicitors acting for vendors should adopt the practice of abstracting the certificates. If the practice came to be adopted widely then the court would probably decide that a vendor was under a duty to deduce title in the customary fashion and so to draw the abstract in this way.

Even if it is admitted that at the present time a vendor cannot be compelled to adopt the practice now advocated, the purchaser may be able to avoid making fresh searches. In the quotation taken from Strong's Guide it was suggested that a requisition should be made asking for the production of certificates. There is no decision requiring the vendor to produce search certificates and most solicitors produce only such abstracted documents as are in the vendor's possession. Nevertheless the vendor seems to have nothing to lose by producing any certificates he holds, and if he does so the purchaser's solicitor can make a note of them and avoid duplicating them.

The question then remains what action the purchaser's solicitor should take if the vendor does not hold certificates of search against earlier estate owners or if he refuses to produce them and the purchaser is not prepared to challenge the refusal. In Strong's Guide, at p. 15, it is stated that "As time goes on the number of post-1925 estate owners against whom searches must be made (if official certificates are not produced by the vendor) may be very large, and the cost of searching may in small transactions hardly appear to justify the trouble and expense involved, but the omission of any of the essential searches may result in a claim for damages for negligence." This view is similar to that usually expressed by text-book writers but it is as well to note that there is no allegation that an action for negligence will necessarily lie. The present writer expressed his view in the thirteenth edition of Emmet on Title, vol. I, at p. 183, in these words: "Particularly if the value of the property is small, it is believed that many solicitors are of the opinion that it is sufficient if they search in the names of the estate owners since the last transaction for value on which searches can reasonably be expected to have been made. It is thought that a solicitor would not be held to have been guilty of negligence if he took such a course and, for some unusual reason, an undisclosed charge was later found registered against a previous estate owner." It is impossible to obtain precise information on the matter, but the writer has gained the impression that few solicitors do search prior to the last transaction for value unless the current transaction is a large one or there is reason to suspect that the previous transaction might not have been carried out with care. In almost any purchase there is an element of risk whatever care is used, particularly in these days of planning and other proposals,

and it is difficult to agree that failure to search against the names of estate owners against whom the vendor can be expected to have searched is necessarily negligence giving rise to a cause of action.

The position in Yorkshire is, perhaps, more serious than anywhere else in England and Wales. It is necessary to search in the deeds register and in the land charges register kept at the registry at Beverley, Northallerton, or Wakefield, as the case may be, and also in the land charges register in London as well as in the local land charges register. The cost of official searches in the deeds registers is considerable, being 7s. 6d. for any period not exceeding ten years and 2s. 6d. for every additional period of five years in any one name. As it is not unusual to have to search against eight or ten names the total fees for searches are often as much as £4 or £5. So far as the writer has been able to ascertain it is the invariable practice to search in the deeds register only so far back as the last conveyance for value. If this rule were not adopted the cost would often be quite unreasonable.

The writer's conclusions are as follows: first, that certificates in the possession of the vendor should be abstracted and even if this is not done they should be produced on request. Secondly, that if this practice is adopted it will not be difficult to supplement them where they are incomplete and the purchaser's solicitor should normally do so. Thirdly, if the practice is not adopted the purchaser's solicitor runs a risk if he does not search against all post-1926 estate owners, but many (probably most) solicitors seem content to run such risk as there may be.

One other interesting point concerns searches before the root of title. It is well known that a risk is run by any purchaser who accepts less than a thirty-year title. However, in a few years' time it will be possible to have a full thirty-year title with a root after 1925. It may then be impossible to search against estate owners who had estates before the root of title as they may not be known but, nevertheless, registration of an interest against them will be notice to a purchaser under the Law of Property Act, 1925, s. 198. This means that the rules for investigating title have, in theory, a serious flaw, but in practice the likelihood of an undisclosed charge appearing after thirty years is small. In any case there was always the same chance of an earlier *legal* estate remaining binding on a purchaser, the important change made by the 1925 legislation in this respect being to make equitable interests binding on a subsequent purchaser, even if he did not know about them, provided they were registered. As any such interests, legal or equitable, created before the root of title are likely to be barred by lapse of time, the problem is not a serious one, but it does illustrate the difficulty of devising a completely satisfactory system for investigation of title.

J. G. S.

HERE AND THERE

THE SPEAKER'S PETITION

AFTER a week when the papers seem to have been full of nothing but murderous teen-age thugs, on the one hand, and, on the other, crypto-Communist spies whose activities, as in some incredible Wellsian fantasy, threaten the very existence of life on this planet, it is a revival of the spirit to return to the ancient sanities of our Constitution, to see the freely elected Commons freely elect their Speaker or "Common Mouth" and to hear him request for them, and the Lord Chancellor in the name of His Majesty accord, "all their ancient and undoubted rights and privileges especially the freedom of speech in debate." During the smooth, safe years, that now seem so distant, comfortable men took for granted freedom under the law, as if it were part of the course of nature, and convinced themselves that violence and arbitrary tyranny belonged as much to the dead past as the bow and arrow or the stone-age axe, and as soon expected to see the torture chamber return to Europe as the stage coach to its roads. They tended then to treat our constitutional forms and ceremonials as interesting but antiquated mummeries, but once again these may be seen for what they are, the outward and visible signs of liberties as precarious still as they were once hard won. This freedom of debate—it is interesting to recall by the mouth of what great Englishman and accomplished lawyer it was first expressly crystallised as a principle of our constitution. It is 1523; Henry VIII, that executive-minded monarch, is king. Thomas More is elected Speaker of the Commons. (You may see him so painted on the walls of St. Stephen's Hall at Westminster.) Here is his speech: "Therefore, most gracious Sovereign, considering that in your High Court of Parliament is nothing intreated but matter of weight and importance concerning your realm and your own royal estate, it could not fail to let and put to silence from giving of their advice and counsel many of your discreet Commons, to the great hindrance of the common affairs, except that every of your Commons were utterly discharged of all doubt and fear how anything that it should happen them to speak should happen of your Highness to be taken . . . It may therefore like your most abundant Grace . . . to give all your Commons here assembled your most gracious licence and pardon freely, without doubt of your dreadful displeasure, every man to discharge his conscience and boldly, in everything incident among us, to declare his advice." And so it was granted and so it remained.

DOMESTIC RELATIONS

LATELY, we have noticed, odds and ends of news from various quarters of the globe have tended to throw shafts of illuminating radiance on the law of domestic relations as it is administered in different parts of the world—husband and wife, problem triangle and betrothed couples. Take Tokio first, the longest journey out. Mrs. Taki Kinoshita (aged thirty-four) is asleep with her husband. Enter (somewhat unexpectedly by any social convention) Mr. Kinoshita's outside female interest. Mrs. Kinoshita seizes a hatchet (a somewhat unusual article of bedroom furniture—but then Japan is so quaint) and finally dispatches the other lady. Mrs. Kinoshita is tried for murder and the Japanese women's organisations (with a solidarity rare in this country except among dramatic critics) support her defence. Held (as the headnote to the law report will doubtless put it), that her action was the "natural, unpremeditated behaviour of a woman trying to protect her home and family." Sentence, three years' imprisonment, but its operation suspended. Now try France. At the Reims Assizes a farm labourer was tried for shooting his wife in a fit of jealousy at the universality of her taste in men—French, American or German, it was all the same. The learned judge said (*a*) that she was "lazy, vicious and hysterical"; (*b*) that never had he seen a more worthy man in the dock. Sentence, one franc (viz., a farthing) fine—well within even a farm labourer's means—and five years' suspended sentence, practically congratulations. (For English law, compare *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588.) At Tivoli, in Italy, Emma Casale leads a hundred women to the gaol to protest against the arrest of her betrothed. "I can't bear to be parted from him." "Right," said the authorities in effect, "come inside too." The perfect solution. Grimmer is the story of the Irish girl whose fiancé is serving a fifteen-year sentence at Belfast for treason felony. Once a month she is allowed a twenty-minute visit. They talk in the presence of a warder through a thin wire mesh. So it will be, this tragic fidelity, till 1958. Back now to England. A young lady sent to prison for eighteen months for forgery and theft asked the Recorder at the Old Bailey for a day's release on bail to marry the son of the woman from whom she had stolen. There is something of the eighteenth century and the spirit of the Beggar's Opera about the situation, but Sir Gerald Dodson sat firm with an almost poetic homily: "If your affections are sincere, then time will

test their sincerity without injuring them. If they are refined in the fire of experience, they will turn out to be true and pure gold and I hope they may be so." Application dismissed.

ANY OLD BUILDINGS?

"MIDDLE TEMPLE Library is to be floodlit . . . next week . . . Workmen to-day fixed scores of lights all around the ancient ivy-covered building" (The *Star*). Journalists, after all, *do* work next door to the Temple. What can the one who wrote that piece have been thinking of? No, not the architecture of the aftermath that temporarily houses the books in Brick Court. Well, it must be the former bombed library by the Essex Stairs. But ancient? Venerable and even romantic though it may now appear in semi-ruin, this is that Victorian Gothic intrusion once described as a constant, unpleasant reminder that Lord Chancellor Westbury had a brother-in-law who was an architect. Apropos of the flood-lighting, the illuminated spire of the Law Courts has a perfectly charming effect seen shining through the dark trees of New Square, Lincoln's Inn.

RICHARD ROE.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Refresher Fees

Sir,—Might I call your attention to a statement on p. 26 of the 14th January number of your paper. Halfway down the right-hand column your contributor states: "The practice of the Central Taxing Office in most cases is to allow refresher fees at the rate of 50 per cent. of the brief fee . . ."

This is a practice of which I am totally unaware and I know of no rule-of-thumb for arriving at the proper amount to allow as a refresher. It can only be arrived at after considering all the circumstances. I write this letter as I am sure that neither you nor your contributor would like a very useful attempt to elucidate a little-understood subject to be marred by a misstatement which might mislead young practitioners.

I assume, of course, that the Taxing Office referred to is the Taxing Office of the Supreme Court from which I write.

Royal Courts of Justice, W.C.2. D. S. GIBBON.

[We are indebted to Sir Douglas Gibbon for drawing attention to this point.—ED.]

Forensic Dress

Sir,—I am inclined to think that those members of the profession who are so busy advocating the introduction of better and brighter forensic dress for solicitors have lost sight of one important fact. A very large amount of county court advocacy is, and always has been, done by admitted managing clerks, who, as everyone knows, are for the most part very poorly paid.

I myself recently had to borrow the money from a relative to purchase a gown and bands, because my principal would not lend me his, and I know of a number of assistant solicitors who have a struggle to make ends meet.

I consider that this is an inopportune moment to add to the burdens of the junior members of the profession.

London, N.W. UNDERDOG.

DEATH DUTIES

CAPITAL MONEYS—CHANGES OF PRACTICE

Following the decision of the House of Lords in *Midleton* (*Earl*) v. *Cottesloe* (*Baron*) [1949] A.C. 418, the Board of Inland Revenue state that the following changes have been made in the practice relating to capital moneys arising from a sale of settled land under the Settled Land Acts.

Such moneys will no longer be treated as real property for the purposes of s. 6 (8) of the Finance Act, 1894, and s. 18 (1) of the Finance Act, 1896; and a succession to such moneys will be treated as a succession to personalty whether they are retained in settlement or not. Accordingly, interest on estate duty payable in respect of such capital moneys and interest on succession duty payable upon a succession to an absolute interest in them will run from the death or other event giving rise to the claim for duty, and the accountable parties will not, in such cases, have the option of paying the duty by instalments.

In the application of the relief given in the case of quick successions by s. 15 of the Finance Act, 1914, capital moneys, passing as such on the first death, whether or not they are subjected by the trust instrument to a trust for re-investment in land, will not be treated as "land" or an "interest in land" for the purposes of that section, and no quick succession allowance will be available on the second death, whether the property then passing consists of the capital moneys or of land bought with them. Further, a quick succession allowance will not be available where the property passing on the second death consists of capital moneys representing land which, as such, bore estate duty on the first death.

PRACTICE DIRECTION

CHANCERY DIVISION

In the ordinary course Witness Actions in the Chancery Division after Easter will appear in one or other of the Witness Lists twelve days after being set down for trial and, subject to what is provided below, will come on for hearing in the order in which they appear in the Lists.

On and after the 15th March, 1950, applications may be made by counsel for the fixing of a date for the hearing of an action appearing in any of the Witness Lists. Such applications should be made to the judge in charge of that List, and will be acceded to in all suitable cases.

By direction of the Chancery Judges.

W. S. JONES,

6th March, 1950. *Chief Registrar.*

BOOKS RECEIVED

Strong's Practical Guide to Searches on Dealings with Land. Second Edition. By C. H. OLIVER, Solicitor. 1950. pp. xx and (with Index) 170. London: The Solicitors' Law Stationery Society, Ltd. 18s. net.

Management and the Accountant. A series of six lectures delivered to the London and District Society of Chartered Accountants. Collated by S. H. GILLETT, M.C., F.C.A., Chairman of the London and District Society of Chartered Accountants, 1948–49. 1950. pp. 96. London: Gee & Co. (Publishers), Ltd. 3s. net.

Guide to the Practice of the Crown Office and Associates Department. Supplement. By J. O. GRIFFITHS, of the Central Office. 1950. pp. viii and 86. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 12s. 6d. net.

After Court Hours. By GILCHRIST ALEXANDER, a former judge of the High Court, Tanganyika. With six caricatures by "Kapp." 1950. pp. xi and (with Index) 278. London: Butterworth & Co., Ltd. 10s. 6d. net.

Massachusetts Law Quarterly. Vol. 34, No. 5. December, 1949. Boston: Massachusetts Bar Association.

Police Law. An Arrangement of Law and Regulations for the Use of Police Officers. By CECIL C. H. MORIARTY, C.B.E., LL.D. Tenth Edition. 1950. pp. xx and (with Index) 590. London: Butterworth & Co. (Publishers), Ltd. 10s. net.

Rhyming Relics of the Legal Past. With an Introduction by L. G. H. HORTON-SMITH, M.A., of Lincoln's Inn, Barrister-at-Law. Reprinted in revised form from the *Justice of the Peace*. London: L. G. H. Horton-Smith. 1s. 9d. net.

Slater's Mercantile Law. Twelfth Edition. By R. W. HOLLAND O.B.E., M.A., M.Sc., LL.D., of the Middle Temple, Barrister-at-Law, and R. H. CODE HOLLAND, B.A. (Lond.), of the Middle Temple, Barrister-at-Law. 1950. pp. xliv and (with Index) 654. London: Sir Isaac Pitman & Sons, Ltd. 15s. net.

NOTES OF CASES

COURT OF APPEAL

NEGLIGENCE: CHILD INJURED ON WASTE LAND

Williams *v.* Cardiff Corporation

Somervell and Jenkins, L.JJ., and Romer, J.
12th January, 1950

Appeal from Cardiff County Court.

An infant, aged four and a half years, was playing on a piece of waste ground, the property of the defendant corporation, when he rolled down a bank on to broken glass and tins, and was injured in the face. In an action brought by his father as next friend he recovered damages against the corporation, which now appealed.

SOMERVELL, L.J., having referred to *Liddle* v. *Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, at p. 112, and *Morley* v. *Staffordshire County Council* (1939), 83 SOL. J. 848, said that there was clearly evidence on which the county court judge could find that the existence of the broken glass on land on which the children were constantly allowed to play constituted, with the bank, a trap within the principles laid down with reference to occupiers of land on which children were allowed by those occupiers to go and play. He thought, however, that this was a trap rather than an allurement, the word which the judge had used. The word "allurement" had been generally applied to something which would be attractive to children, such as the red berries eaten by the child in *Glasgow Corporation* v. *Taylor* [1922] 1 A.C. 44, rather than to circumstances such as these, where the corporation were, in effect, licensing children to come and play on the land, which contained, as the corporation knew, pieces of glass and other objects, such as tins, which might be extremely dangerous to children falling. The appeal should be dismissed.

JENKINS, L.J., concurring, said that the standard of care due to such persons as children demanded that, unless and until the corporation took measures to prevent their presence on that piece of ground, they should keep it free from traps or concealed dangers, such as broken glass, the danger from which would clearly not be apparent to children of tender years.

ROMER, J., delivered a concurring judgment.

Appeal dismissed.

APPEARANCES: *Donald Walters* (*Theodore Goddard & Co.*); *David Pennant* (*Stikeman & Co.*, for *Phillips & Buck*, Cardiff).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

NEGLIGENCE: OMNIBUS: PASSENGER INJURED BY SUDDEN BRAKING

Parkinson *v.* Liverpool Corporation

Tucker, Cohen and Asquith, L.JJ.
12th January, 1950

Appeal from Pritchard, J.

The plaintiff was travelling in an omnibus belonging to the defendant corporation. Wishing to alight, he left his seat and stood up in the gangway between the seats. At that moment the driver of the omnibus suddenly applied his brakes in order to avoid a dog. The plaintiff was thrown heavily to the floor and sustained injuries. Pritchard, J., at Liverpool Assizes, dismissed the plaintiff's action for damages, being satisfied that in an emergency the driver had acted reasonably and without negligence. The plaintiff appealed.

TUCKER, L.J., said that Pritchard, J.'s judgment amounted to a finding that the driver's evidence established that an emergency arose, and that the driver had done what an ordinary, reasonable, careful driver would do in the circumstances of that particular emergency. He (the lord justice) thought that decision clearly right on the facts which were found, and that the judge approached the problem from the proper angle. A Scottish case, *Sutherland* v. *Glasgow Corporation* (1949), S.L.T., pts. 45–46, p. 388, tended to support the view that the driver owed some paramount duty to his passengers and could not discharge the onus lying on him if he injured one of those passengers by saying that he had acted as he had in order to avoid running over a dog. He (the lord justice) observed that each of the judges there said that each case of this kind must depend upon its own facts. Factors in that case differentiated it from the present. He was not prepared to accept as the law to be applied in this country, in the circumstances of a case of this kind, all the statements with regard to the duties owed by the driver of a tramcar in the circumstances which occurred in that case; and he was by no means prepared to accept that the duty could be expressed in quite the language used by the Lord Justice-Clerk or by Lord Jameson. The duty of the driver was to take reasonable care, having regard to the passengers whom he was carrying and to other users of the road. The driver here had acted as any reasonable person would act in the emergency. The appeal should be dismissed.

COHEN and ASQUITH, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Sir Noel Goldie*, K.C., and *G. N. England* (*Helder, Roberts, Giles & Co.*, for *John A. Behn, Twyford and Reece*, Liverpool); *Nelson*, K.C., and *Baucher* (*Cree, Godfrey & Wood*, for *The Town Clerk*, Liverpool).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CONTRACT: DELAY: TIME OF ESSENCE

Charles Rickards, Ltd. *v.* Oppenheim

Bucknill, Singleton and Denning, L.JJ.
16th January, 1950

Appeal from Finnemore, J.

The plaintiffs contracted for the building of a body on the defendant's motor-car chassis, a time for the work being stipulated. The time was outrun. The defendant at first waived the delay, but eventually gave reasonable notice that he would refuse to accept the car if it were not completed by a certain date. It was not, and he refused to accept it. Finnemore, J., held that the contract was for the sale of goods; that time was of the essence of the contract, the work to be completed in at the latest seven months; that that provision was waived by the defendant; that by his notice he had made time of the essence of the contract again; and that, as the car was not completed by the new date specified in the notice, the defendant was entitled to cancel the contract. Accordingly, he gave judgment for the defendant on both claim and counter-claim. The plaintiffs appealed.

DENNING, L.J., said that, if there had been originally a contract without any stipulation at all as to time, and, therefore, with the implication of reasonable time, it might be that the plaintiffs could have said that they had fulfilled the contract; but the case was very different when there was an initial contract making time of the essence, as in this case. Whether the contract was for the sale of goods or for work and labour, the defendant was entitled to give a notice bringing the matter to a head. It would be most unreasonable if he, by having been lenient and waived the initial expressed time, should have prevented himself from ever thereafter insisting on reasonably quick delivery. In his opinion, the defendant was entitled to give a reasonable notice making time once more of the essence for completion of the contract. Adequate protection to the plaintiff suppliers was given by the requirement that the notice should be reasonable. He thought that the notice had been reasonable.

SINGLETON, L.J., agreeing, was inclined to dissent from Finnemore's view that this was a contract for the sale of goods and not one for work and labour.

BUCKNILL, L.J., agreed. Appeal dismissed.

APPEARANCES: *Eric Sachs*, K.C., and *Elliot Gorst* (*Keene, Marsland & Co.*); *Levy*, K.C., and *Faulks* (*Capel Cure, Glynn Barton & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DEVOLUTION OF LUNATIC'S INTEREST IN REAL ESTATE

In re Bradshaw; Bradshaw *v.* Bradshaw

Evershed, M.R., Somervell and Jenkins, L.JJ.
14th February, 1950

Appeal from Danckwerts, J. (93 SOL. J. 774).

By the will of W B, who died in 1855, real estate was devised to his son T B for life and subject thereto on trust for the children of T B who should attain twenty-one. One of these children, a daughter, C M B, became of unsound mind in 1912. In 1936 a receiver of her estate was appointed and in 1948 she died a spinster without having recovered her testamentary capacity. The question was raised by summons whether the share of real estate devised to her by her grandfather's will, which remained unsold, passed as real estate to her heir at law or as personalty to her statutory next of kin. Danckwerts, J., held that the share was a share in the proceeds of sale of the property and therefore passed to her next of kin. The heir at law appealed.

EVERSHED, M.R., said it was a difficult and complex problem which had given rise to some divergence of judicial opinion. The question was whether the intestate was entitled at the date of her death to a beneficial interest in real estate, within s. 51 (2) of the Administration of Estates Act, 1925; if she was it would devolve in accordance with the old law of real estate before 1926; if not, it would go, as the learned judge had decided, to her next of kin. "Real estate" was defined in s. 55 of the Act, save as provided in Pt. IV, which included s. 51. Danckwerts, J., thought that he was bound by the decision of Roxburgh, J., in *In re Donkin* [1948] Ch. 74, that the intestate's interest, having been converted into personalty, devolved on her next of kin, but the facts in that case were different. In that case the lunatic succeeded as next of kin to a share in her brother's estate, which included realty, in 1928, i.e., after the Act of 1925 had come into force. He thought that *In re Donkin* was correctly decided, but it was distinguishable from the present case. In his opinion, "beneficial interests in real estate" must possess at least two characteristics; they must have belonged to the lunatic before 1st January, 1926, and they must also exist and belong to the lunatic at the time of his or her death. Further, they must be such that at the date of the coming into operation of the Administration of Estates Act, 1925, they would have devolved as real property and gone to the heir. The section applied to a lunatic or defective of full age at the commencement of the Act and unable to make a will; therefore the beneficial interest must have belonged to her at that date. It could not be doubted that at least in some contexts a share in the proceeds of sale of realty would be covered by the phrase "a beneficial interest in real estate" (see *In re Warren* [1932] 1 Ch. 42 and *In re Kempthorne* [1930] 1 Ch. 268). He felt compelled to the view that the phrase "any beneficial interest in real estate" was used to cover such an interest as the one now in question. The section was designed to preserve the rights of those who might be dispossessed by the coming into operation of the Act of 1925 in such circumstances that the testator owing to his inability to make a will could not prevent such dispossession. Undivided shares in real estate for those purposes ought not to be treated differently from other interests in real estate. But the conclusion he had come to did not involve that, if the land had been subjected to a trust for sale before the date of the Act, the interest of the lunatic in the proceeds of sale would have descended as real estate under the old law. For those reasons he would allow the appeal.

SOMERVELL, L.J., delivered judgment in agreement with the Master of the Rolls.

JENKINS, L.J., regretted that he was unable to agree. It could not be doubted that the effect of the statutory trust for sale imposed on the shares of realty was just as effective as any other trust for sale in converting the land in equity from realty to personalty. The Legislature might have provided for the present case in the Law of Property Act, 1925, but, in his opinion, they had not done so. The saving clause in the Administration of Estates Act applied only to the real estate and not to the personal estate of a lunatic, which descended in the same way as the personalty of a person of sound mind. In his lordship's opinion, the only material date at which to consider if the lunatic had an interest in real estate was the date of the lunatic's death and no other. He would therefore dismiss the appeal.

Appeal allowed.

APPEARANCES: *A. H. Droop; N. S. S. Warren; T. K. Wigan* (*Blyth, Dutton, Wright & Bennett* for all parties).

[Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.]

DIVORCE: MAINTENANCE: WIFE'S RIGHTS UNDER THE STANDING DECREE

Trestain *v.* Trestain

Bucknill, Singleton and Denning, L.JJ.
27th February, 1950

Appeal from Mr. Commissioner Grazebrook, K.C., sitting at Bristol Assizes.

A wife appealed from the decree *nisi* pronounced in favour of her husband on the ground of her cruelty. (*Cur. adv. vult.*)

BUCKNILL, L.J., in a written judgment, said that, on the whole, there was in his opinion evidence on which the commissioner could find that the wife had been guilty of such cruelty, consisting largely in making unfounded charges against her husband, as entitled him to a decree.

SINGLETON, L.J., in a written judgment, said that counsel had told the court that a probable result of the decree would be that the wife would not be entitled to maintenance even if she should be in need of it. That seemed strange, and he (his lordship) could not believe that it was right—if the husband was, as he (his lordship) thought, responsible for the break-up of the marriage.

DENNING, L.J., reading his judgment, said that it was common knowledge that, when parties were divorced, one could not really tell which of the two was to blame merely by asking which of them obtained the divorce. The form of the decree did not give a true picture of the conduct of the parties. The marriage here had irretrievably broken down and was better dissolved. But when it came to maintenance, or any of the other ancillary questions which followed on divorce, then let the truth be seen. The truth was that the husband had been guilty of the grave matrimonial offence of adultery with, be it noted, a girl twenty years his junior; whereas the most that the wife had been guilty of was abusive and scandalous words all at a time when she had a good deal to put up with from him. There was nothing in the statute which said that a wife against whom a decree had been made could not be awarded maintenance. It merely said that, on a decree of divorce, a court might award maintenance to the wife; and ever since 1902 it had been settled that that included a wife against whom a decree had been made (*Ashcroft* v. *Ashcroft* [1902] P. 270). The court had, of course to have regard to "the conduct of the parties." He wished that questions of maintenance could be determined by the judges who tried these cases: but they could at least express their views—and in his opinion they should do so—on the conduct of the parties so as to assist those who had to determine maintenance. The registrar or the judge who had to determine maintenance here would take note of what had been said in that court about the conduct of the parties, and thus the same effect would be achieved as if they had actually pronounced a decree in the wife's favour. In so far as the question of divorce or no divorce was concerned, the court did not interfere, and the appeal itself therefore failed. Appeal dismissed.

APPEARANCES: *Moylan* (*Reed & Reed*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

DIVISIONAL COURT

QUARTER SESSIONS: HOW FAR COMPELLABLE TO STATE CASE

***R. v.* Somerset Justices; *ex parte* J. Cole & Partners, and Another**

Lord Goddard, C.J., Lynskey and Sellers, JJ.
17th January, 1950

Application for an order of mandamus.

The applicant company appealed to a court of summary jurisdiction against an enforcement order served on them by the local town planning authority under s. 23 (2) of the Town and Country Planning Act, 1947, in respect of the use which they were making of their land as a camping site. The justices made an order which left both the company and the authority dissatisfied. Both appealed to quarter sessions, who varied the order as the authority wished. The company only applied to quarter sessions three weeks after the hearing to state a case. Quarter sessions refused, and the company now sought an order of mandamus to compel them to do so.

LORD GODDARD, C.J., said that before the Criminal Justice Act, 1925, was passed, there had been no power in the court to grant a mandamus to quarter sessions compelling them to state a case against their will. As that might cause injustice, s. 20 of the Act of 1925 provided that, in the case of an appeal to quarter sessions against a conviction by a court of summary jurisdiction, either party could apply for a case to be stated and, if the application were refused, might apply to the Divisional Court for an order of mandamus. That provision was only applicable in the case of a matter involving a conviction, which the present case did not. If there had always been an inherent power in the court to grant mandamus to quarter sessions, s. 20 of the Act of 1925 would have been unnecessary. The court had never assumed, and had always disclaimed, the power to issue a mandamus compelling quarter sessions to state a case. The powers given to quarter sessions to state a case were stated in *Walsall Overseers* v. *London and North-Western Rly. Co.* (1878), 4 App. Cas. 30, and *R.* v. *Pembrokeshire Justices* (1831), 2 B. & Ad. 391; and *Ex parte Jarvin Inhabitants* (1840), 9 Dowl. P.R. 120, showed that the court, in special circumstances, might issue a mandamus directing quarter sessions to state a case if they had already granted an application to them to state one and then omitted to state it, but not directing them to grant the application in the first place. That was a matter purely for their discretion. Archbold's Quarter Sessions, 6th ed., p. 442, stated: "But it is perfectly optional with the sessions whether they will thus state a special case or not; neither the parties nor even the King's Bench Division itself can compel them to do so." In the circumstances the court was of opinion that it had no power to grant mandamus in the present case. The application, therefore, failed.

LYNSKEY and SELLERS, JJ., agreed. Application refused.

APPEARANCES: *Neligan* (*Arbeid & Co.*); *Squibb* (*Sharpe, Pritchard & Co.*, for *Harold King*, Taunton); *J. F. E. Stephenson* (*Collyer-Bristow & Co.*, for *P. A. Selborne Stringer*, Trowbridge).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

GAMING ACTS: PROCEDURE: ARREST

Coughtrey *v.* Porter

Lord Goddard, C.J., Lynskey and Sellers, JJ.
16th January, 1950

Case stated by Nottingham justices.

An information was preferred against the defendant, alleging contravention of s. 1 of the Betting Act, 1853, in the use of certain premises to enable persons to play with gaming machines. Complaint had also been made on oath before a justice, who had issued a special warrant under s. 3 of the Gaming Act, 1845, empowering the police to enter the premises, arrest the keeper of them and seize the machines. When the police went to the premises they found no one there, but they seized the machines. Some hours later the defendant called at police headquarters, where a police officer purported to arrest him, to charge him with using the premises as a common gaming house, contrary to the Act of 1945, and then to release him on his entering into a recognisance to appear before the justices. When the defendant appeared before the justices, he pleaded guilty to the information under the Act of 1853, but refused to plead to the charge under the Act of 1845. The justices fined him on the charge under the Act of 1853. The charge of keeping a common gaming house was not proceeded with, but the justices ordered the machines to be destroyed. By s. 3 of the Gaming Act, 1845, justices are empowered, in any case in which they themselves have power to enter premises where unlawful gaming is suspected, on sworn complaint to them that there is reason to suspect that premises are being kept as a common gaming house, "to give authority, by special warrant . . . to any constable to enter . . . into such house . . . and to arrest . . . and bring before a justice all such persons found therein as might have been arrested by such justice had he been personally present . . ." By s. 21 of the Criminal Justice Administration Act, 1914, "A justice on issuing a warrant for the arrest of any person may . . . by endorsement on the warrant, direct that the person named in the warrant be on arrest released on his entering into" a recognisance for his appearance before the justices. The defendant appealed against the order.

LORD GODDARD, C.J., said that the confusion which the statutes relating to gaming were in, excused the justices for going wrong and ought to be brought to the notice of the Royal Commission on Betting, Lotteries and Gaming. The justice's power under s. 3 of the Act of 1845 with regard to arresting persons was that which he had under s. 14 of the Suppression of Unlawful Games Act, 1541, that is, to arrest persons found on the premises. The defendant's arrest at the police station could accordingly not be on the warrant. The police officer had no power to release the defendant on bail under s. 21 of the Act of 1914 because the latter, not having been found on the premises, was not the person named in the warrant, so that his release could only have been unconditional. He was accordingly not before the justices by virtue of the warrant (*a*) because he had not been arrested under it and (*b*) because in any event it had expired on his release. As he was only before the justices on the information preferred under the Act of 1853, and as that Act, unlike that of 1845, did not empower the justices to order the destruction of gaming machines, it followed that the order for the destruction of those of the defendant was invalid.

LYNSKEY and SELLERS, JJ., agreed. Appeal allowed.

APPEARANCES: *John Hobson* (*Sidney C. Elphick*, for *H. B. Clayton, Son & Ellis*, Nottingham); *Gattie* (*Sharpe, Pritchard & Co.*, for the *Town Clerk*, Nottingham).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

ROAD TRAFFIC: "HEAVY MOTOR CAR" OR "LIGHT LOCOMOTIVE"

Keeble *v.* Miller

Lord Goddard, C.J., and Lynskey, J.
20th January, 1950

Case stated by the Metropolitan Magistrate sitting at Thames Magistrates' Court.

By s. 2 (1) (*b*) of the Road Traffic Act, 1930, "light locomotives" are defined as mechanically propelled vehicles weighing between 7¼ and 11½ tons inclusive and "not constructed themselves to carry any load" except, among other things, "loose tools and loose equipment." By s. 2 (4) (*b*) where a motor vehicle is fitted with a "dynamo . . . or other special appliance . . . which is a permanent fixture the appliance shall not be deemed to constitute a load . . ." By s. 18 (1) a

light locomotive may draw three trailers on the road. A heavy motor car may draw only one. The owner of a lorry had equipped it with a dynamo lighting plant driven by a diesel engine, all of which was fixed in and to the body. Diesel oil for the engine and planks and poles for running barrels of oil up into the lorry were also carried. The lorry was stopped while hauling three trailers. It weighed 7½ tons. Thus, if not a light locomotive for which three trailers were legitimate, it was a heavy motor car, which might only be used to draw one. The owner was charged with using a heavy motor car to draw more than one trailer. The magistrate held that the vehicle was constructed itself to carry a load because, as a lorry, it had originally been so constructed. He found that the existence of the dynamo lighting plant did not preclude the carrying of other loads. He accordingly decided that the vehicle was not a light locomotive, and that an offence had been committed. The defendant appealed.

LYNSKEY, J., said that the relevant point of time as at which to determine whether the vehicle was "constructed" as a light locomotive was that of the alleged offence. The magistrate had accordingly erred on that point. Next, the mere existence of space inside the lorry for a load as well as the plant was not the correct test of whether it was constructed for that purpose. The case must be remitted to the magistrate for him to determine, possibly on inspection of the vehicle, whether, in view of the material dimensions, it could, notwithstanding the special appliance fitted to it, still be said to be constructed itself "to carry any load."

LORD GODDARD, C.J., agreed. Case remitted.

APPEARANCES: *Raeburn*, K.C., and *Harris Walker* (*Woodman, Matthews & Co.*); *Gattie* (*Solicitor, Metropolitan Police*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

REQUISITIONED LAND: ALTERATION: REINSTATEMENT: COMPENSATION

J. Lyons & Co., Ltd. *v.* Home Secretary

Lord Goddard, C.J., Lynskey and Sellers, JJ.
23rd January, 1950

Special case stated by an arbitrator.

In 1942 the Crown requisitioned the basement of premises belonging to the claimant company under reg. 51 of the Defence (General) Regulations, 1939, and adapted it as an air-raid shelter by building brick walls in it. The premises were not reinstated in their original condition (so far as possible) until some time after the de-requisitioning in July, 1945. The company claimed compensation under s. 3 (2) of the Compensation (Defence) Act, 1939, in respect of the diminution in the annual value of the premises for that period. The question left by the arbitrator for the opinion of the court was whether that claim was maintainable. By s. 1 of the Act of 1939, compensation is payable in respect of, among other things, work done in the exercise of emergency powers on behalf of the Crown on any land. Section 3 provides for payment to the person who for the time being is entitled to occupy any land of compensation for the doing of any work on the land. By s. 3 (8): "No compensation under this section shall, in relation to any land, be payable in respect of any period for which possession of that land is taken on behalf of His Majesty . . ." By s. 11 (2) of the Requisitioned Land and War Works Act, 1948: "Nothing in s. 3 of the Act of 1939 . . . shall apply . . . to damage to land occurring while possession of the land is retained."

LYNSKEY, J., reading the judgment of the court, said that inasmuch as, while land was under requisition, it was the Crown or its representatives who was or were "the person who for the time being is entitled to occupy the land," s. 3 of the Act of 1939 was referable to work done on land which had not been requisitioned by the Crown; for it was to that "person" that compensation under that section was payable. Moreover, the court was satisfied that "damage to land" in s. 11 (2) of the Act of 1948 included damage ascribable to "the doing of work" on the land, so that that subsection provided that no compensation was payable under s. 3 of the Act of 1939 for work done during the period when possession of the land was in the Crown. Furthermore, "damage to land" meant physical damage to the land, so that, if that damage occurred while possession was retained, s. 3 of the Act of 1939, by subs. (8), gave no compensation for the damage even though its effects might persist after possession had been yielded up. Therefore no compensation under the Act of 1939 was recoverable by the company for damage to the annual value of the basement for the period between de-requisitioning and reinstatement to its original condition.

Judgment accordingly.

APPEARANCES: *Salmon*, K.C., and *Ashworth* (*Bartlett and Gluckstein*); *H. L. Parker* (*Treasury Solicitor*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

RED PETROL: PRIMA FACIE CASE

Taylor *v.* Ciecierski

Lord Goddard, C.J., Byrne and Morris, JJ.
25th January, 1950

Case stated by Bromley (Kent) justices.

An information was preferred against the defendant, a company director, charging him with being the owner of a motor vehicle having in its tank a quantity of commercial petrol contrary to s. 2 (1) of the Motor Spirit (Regulation) Act, 1948. The prosecutor, when on traffic duty, stopped the defendant and tested petrol from the tank of his motor car with a reagent paper. That test, which was repeated a second time, satisfied the prosecutor that the petrol was, *prima facie*, commercial petrol. He then took samples of the petrol, and one of them was analysed by a public analyst. The analyst stated in evidence before the justices that the test which he applied yielded a positive result for diphenylamine, and that he was of opinion that the sample consisted of or contained commercial petrol. In cross-examination, however, he said that theoretically the same result could be produced by derivatives of diphenylamine, being substances of the same group and of very similar composition, but that such substances would not normally be found in petrol; that there would be no purpose in putting them into it; and that, while it was not unlawful for such substances to be supplied to the public, they were uncommon and not easily obtained. The defendant contended that no *prima facie* case had been made against him. The justices, while accepting the evidence of the analyst, were of opinion that the intention of the Act of 1948 was that there would be prescribed ingredients which, when added to motor spirit, could conclusively be proved to be present in it by a subsequent analysis; and that the evidence of the analyst in the present case regarding the presence of diphenylamine was inconclusive. The justices were of the opinion that, where a charge of such a serious nature was brought under the Act, and the case for the prosecution depended solely on the contents of a sample of motor spirit, the sample should be capable of analysis with certainty, and that evidence of that standard regarding the presence of commercial petrol should be submitted to establish a *prima facie* case. They therefore held that no *prima facie* case had been established, and dismissed the information. The prosecutor appealed.

LORD GODDARD, C.J., said that, as the prosecutor had carried out the procedure prescribed by the Act of 1948 with regard to the samples of petrol which he had taken, and as the analyst had examined a sample by the test laid down by the Ministry of Fuel and Power, had certified the presence of commercial petrol in it, and had also given evidence at the hearing, there was obviously a *prima facie* case for the defendant to answer. If the petrol in his tank were not

commercial petrol, he should be given an opportunity of proving so. The case would go back to the justices with an intimation to the above effect. Appeal allowed. Case remitted.

BYRNE and MORRIS, JJ., agreed.

APPEARANCES: *Sir Frank Soskice*, K.C. (S.G.), and *H. L. Parker* (*Treasury Solicitor*); *Hector Hughes*, K.C., and *Reuben* (*Bryan O'Connor & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

EVIDENCE OF MENTALITY GIVEN IN JURY'S ABSENCE

R. *v.* Reynolds

Lord Goddard, C.J., Byrne and Morris, JJ.
23rd January, 1950

Appeal from conviction.

The appellant was indicted at quarter sessions on a charge of indecently assaulting a girl eleven years of age. At the trial the question arose whether the girl, who was being educated at a school for children of retarded development, understood the nature of an oath and was capable of giving sworn evidence. After the chairman had asked the child a number of questions to ascertain her mental capacity, the jury were asked to withdraw while the chairman heard submissions on the matter. In their absence, a school attendance officer gave evidence and was cross-examined. The appellant was convicted, and now appealed.

LORD GODDARD, C.J., giving the judgment of the court, said that the court would rarely interfere with the trial judge's decision that a child was capable of giving sworn evidence, and that it would not do so here. Another question of the greatest importance had arisen however, namely, whether the hearing of the evidence of the school attendance officer in the absence of the jury did not constitute such an irregularity that the conviction could not be allowed to stand. In the opinion of the court, it did. The duty of the chairman under s. 38 of the Children and Young Persons Act, 1933, was to decide, first, whether the child understood the nature of an oath, and, if not, whether it was possessed of sufficient intelligence to justify the reception of unsworn evidence by it on the ground that it understood the duty of telling the truth. No member of the court present had ever known of a case in which a witness had been called to inform a court whether or not a child could give evidence. There might well be cases, of which this was one, in which the chairman might want some assistance, especially if he heard that the child was at some particular sort of school. It was not on that ground that the court thought that there had been a fatal mistake in the present case. In *R.* v. *Dunne* (1929), 21 Cr. App. R. 176, the court decided that the evidence of the child must be given in the presence of the jury, because, although the question whether the child should be sworn was one for the judge, it was most important that the jury should hear the answers given by her and watch her demeanour, in order to assess the weight which they should attach to her evidence. A still stronger reason existed for the presence of the jury when a witness was called to assist the court by stating either what was his or her experience of the character of the child or the impression which the witness might have formed of it: the jury would then have all the facts before them with regard to the child's reputation for truthfulness and whether it was one on whose evidence they could rely. In a criminal trial it should be regarded as most exceptional that any evidence should be given not in the presence of the jury. To that rule there was one well known exception, which had been laid down in mercy and fairness to prisoners, namely, that any evidence as to whether an alleged confession by the accused person had been properly made ought to be given in the absence of the jury. Appeal allowed.

APPEARANCES: *W. R. Rees-Davies* (*Cartwright, Cunningham and Co.*); *Pensotti* (*Hartley & Hine*, Hitchin).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Beccles Water Order, 1950. (S.I. 1950 No. 257.)

Cheese (Amendment No. 2) Order, 1950. (S.I. 1950 No. 279.)

Control of Iron and Steel (No. 77) Order, 1950. (S.I. 1950 No. 258.)

Cotton Waste Prices (Amendment) Order, 1950. (S.I. 1950 No. 265.)

Draft **Double Taxation Relief** (Taxes on Income) (Israel) Order, 1950.

Exchange Control (Authorised Dealers) Order, 1950. (S.I. 1950 No. 259.)

This order amends the list of banks and other persons authorised under the Exchange Control Act, 1947, to deal in foreign currency.

Exchange Control (Authorised Depositaries) Order, 1950. (S.I. 1950 No. 260.)

This order names certain banks and authorises them to act as depositaries for certain securities for the purposes of Pt. III of the Exchange Control Act, 1947.

Food (Points Rationing) (Amendment) Order, 1950. (S.I. 1950 No. 269.)

Land Tax (Redemption) Regulations, 1950. (S.I. 1950 No. 268.)

London—Edinburgh—Thurso Trunk Road (Easter Fearn Diversion) Order, 1950. (S.I. 1950 No. 254.)

Management of Crown Foreshore (Date of Transfer) Order, 1950. (S.I. 1950 No. 267.)

This order fixes 1st April, 1950, as the appointed day for the transfer of the management of Crown foreshores from the Minister of Transport to the Commissioners of Crown Lands under the provisions of Pt. III of the Coast Protection Act, 1949.

Rationing (Personal Points) (Amendment No. 2) Order, 1950. (S.I. 1950 No. 270.)

Rules of the Court of Passage of the City of Liverpool (Crown Proceedings), 1950. (S.I. 1950 No. 271.)

These rules amend the rules of the Liverpool Court of Passage in a number of matters relating to Crown proceedings. They came into effect on 1st February, 1950.

Rules of the Court of Passage of the City of Liverpool (No. 1), 1950. (S.I. 1950 No. 272.)

Among other changes introduced by these rules are a new form of notice of payment into court and a provision that a defendant in an action for personal injuries may pay a sum to the hospital (in respect of the claim for hospital expenses) in respect of liability under s. 36 (2) of the Road Traffic Act, 1936, with or without a payment into court, such payment to the hospital not to be deemed to be an admission of liability. The rules became operative on 1st February, 1950.

Rules of the Salford Hundred Court of Record (Crown Proceedings), 1950. (S.I. 1950 No. 263.)

These rules make a number of additions and alterations to the Salford Court of Hundred consequential upon the Crown Proceedings Act, 1947. The rules came into operation on 1st February, 1950.

REVIEW

Supplement to the Law of Town and Country Planning. By Sir HOWARD ROBERTS, C.B.E., D.L., Solicitor of the Supreme Court, Clerk of the London County Council. 1949. London: Charles Knight & Co., Ltd. 25s. net.

The main work, to which this is a supplement, was published in the early days of the 1947 Act before the issue of most of the orders and regulations essential to the working of the Act. The supplement brings together all the orders and regulations issued up to the end of June, 1949. These are annotated fully and usefully. The Ministry of Town and Country Planning's circulars Nos. 61 and 62 are also reprinted; it is a pity that a few of the more important publications of the Ministry are not included, such as the Memorandum on the Preservation of Trees and Woodlands, which is almost as important as the regulations on the subject, Circular No. 67 as to, *inter alia*, determinations under s. 17, and Circular No. 69 on Planning Appeals. The supplement concludes with addenda to the main work and a consolidated index to the main work and the supplement.

NOTES AND NEWS

Honours and Appointments

Mr. R. A. MACLAREN, of Middlesbrough, has been appointed assistant solicitor in the town clerk's department at Maidenhead.

Mr. S. M. WONTNER-SMITH, senior assistant solicitor at York, has been appointed first assistant solicitor to Bradford Corporation.

Personal Notes

Members of the Newcastle Incorporated Law Society presented Mr. A. D. Minton-Senhouse with a cheque on 28th February to mark his recent retirement after twenty-five years as registrar of Newcastle-on-Tyne County Court.

Miscellaneous

The Law Society Cricket Club announces a dance to be held at The Law Society's Hall (by permission of the Council), on Friday, 31st March, 1950. Dancing from 8 p.m. to 1 a.m. Dinner (optional) from 7 p.m. to 9 p.m. Open to all members of The Law Society, articled clerks and their guests. Evening dress. Fully licensed. Tickets 10s. 6d. each, including buffet, or 17s. 6d. each including dinner and buffet, can be obtained from the Cashier, The Law Society, The Law Society's Hall, Chancery Lane, W.C.2, or Mr. Emrys Jones, Secretary of The Law Society Cricket Club, 64 Stanley Road, Teddington (MOLesey 3690), and should be applied for not later than 24th March.

Wills and Bequests

Mr. W. M. Coode, solicitor, of St. Austell, left £42,118 (£41,902 net).

OBITUARY

MR. J. P. EDWARDS

Mr. John Parry Edwards, one of Liverpool's oldest practising solicitors, died on 27th February, aged 87. He was admitted in 1889.

MR. A. HORNE

Mr. Alfred Horne, of Messrs. Dennison, Horne & Co., of Gracechurch Street, London, E.C.3, died on 2nd March. He was admitted in 1902.

MR. A. D. C. LOFT

Mr. Alfred Dale Capel Loft, retired solicitor, of Stourport, died recently, aged 81. Admitted in 1893, he was until his retirement Coroner for Mid-Worcestershire and clerk to the Hundred House Bench and the Stourport Urban District Council.

MR. W. G. C. MAW

Mr. William George Canney Maw, of Messrs. Atkinson and Sons, of Doncaster, died on 20th February, aged 66. He was admitted in 1910.

MISS C. MORRISON

Miss Carrie Morrison, solicitor, of Lincoln's Inn, died on 20th February. When admitted in 1922 she was the first woman solicitor in England.

MR. C. A. MUIRHEAD

Mr. Charles Albert Muirhead, a former Liverpool solicitor, died on 19th February, aged 77.

MR. F. PERKINS

Mr. Frank Perkins, solicitor, of York, died recently. Admitted in 1888, he was joint registrar of York County Court from 1894 until 1909, and registrar from then until he retired in 1945. He was also registrar of the county courts of Pocklington, Easingwold, Selby and Malton, and was a former president of the Yorkshire Law Society.

MR. S. J. TAYLOR

Mr. Samuel John Taylor, solicitor, of Bexhill, died on 18th February, aged 71. Admitted in 1917, he was town clerk of Bexhill from 1922–38, and mayor in 1946.

MR. E. TOFIELD

Mr. Edwin Tofield, retired solicitor, of Sheffield, died recently, aged 83. He was admitted in 1889.

CASES REPORTED IN VOL. 94

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